Citibank Bhd lwn Titik Juta Sdn Bhd

MAHKAMAH TINGGI (KUALA LUMPUR) — GUAMAN NO S7–24–1582 TAHUN 2006
AZMAN ABDULLAH PK
30 JULY 2008

Undang-Undang Tanah — Gadaian — Perintah jualan — Sama ada memenuhi s 257(1)(c) Kanun Tanah Negara — Sama ada sijil keberhutangan bukti konklusif — Sama ada peminjam membuktikan kewujudan kausa bertentangan

Pihak defendan melaksanakan dua cagaran di bawah Kanun Tanah Negara (KTN) bagi kepentingan plaintif untuk jaminan terhadap kemudahan yang diberikan oleh plaintif kepada defendan dan Unis Far East Sdn Bhd. Jumlah yang terhutang di bawah cagaran adalah perlu dibayar oleh defendan atas tuntutan oleh plaintif. Walau bagaimanapun, pihak peminjam gagal membayar ke atas kemudahan tersebut. Plaintif menuntut bayaran yang tertangguh di bawah cagaran. Oleh kerana defendan gagal memulihkan pemecahan perjanjian kemudahan tersebut, plaintif telah memulakan tindakan ini untuk arahan jualan tanah tercagar tersebut. Antara bantahan yang dikemukakan oleh defendan adalah, ketidakbolehterimaan penyata akaun pinjaman yang berlawanan dengan s 90A Akta Keterangan 1950 ('Akta'), ketidakpatuhan A 83 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan s 257(1)(c) KTN, ketidakserahan notis wajib Borang 16D dan kesilapan di dalam Borang 16D tersebut dan kesilapan di dalam sijil keberhutangan.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Seksyen 2 Akta telah memperuntukkan kecualian prosiding yang menggunakan afidavit yang dikemukakan di mahkamah (lihat perenggan 12).

(2) Pihak plaintif boleh memulihkan jumlah tertunggak yang sebenar di dalam afidavit dengan berpandukan butiran-butiran di bawah A 83 KMT. Pihak defendan tidak membangkitkan isu bahawa afidavit selanjutnya di bawah A 83 yang difailkan oleh plaintif untuk tujuan tarikh-tarikh perbicaraan berikutnya tidak menepati butiran-butiran di dalam A 83. Oleh itu tidak boleh dikatakan bahawa pihak plaintif tidak menyediakan butiran akaun mengikut keperluan A 83 dan jika pun

terdapat apa-apa peninggalan mahkamah ini mempunyai kuasa untuk mengecualikan peninggalan yang lepas itu oleh kerana telah dipulihkan (lihat perenggan 23).

(3) Perintah jualan telah menyatakan jumlah tertunggak mengikut kehendak s 257(1)(c) KTN dan perintah jualan tersebut dibuat setelah mendengar hujahan bantahan defendan (lihat perenggan 24–25).

(4) Hujahan defendan mencabar kesahan serahan ke atas mereka tidak boleh diterima oleh kerana serahan adalah sah. Oleh itu bantahan defendan tidak boleh diterima pakai (lihat perenggan 31).

(5) Perintah jualan yang dipohon oleh plaintif adalah mengikut peruntukan di dalam KTN. Plaintif telah kemukakan sijil keberhutangan dan mengikut *Cempaka Finance Bhd v Ho Lai Ying* [2006] 2 MLJ 120, hakim yang bijaksana memutuskan bahawa sijil keberhutangan tersebut adalah bukti yang konklusif dan beban berpindah kepada defendan untuk menyangkal jumlah yang salah (lihat perenggan 43).

(6) Defendan tidak kemukakan apa-apa keterangan, mencabar sijil keberhutangan; menyangkal jumlah yang dituntut dan oleh itu beban bukti gagal disangkal oleh defendan. Daripada bantahan-bantahan defendan adalah jelas bahawa tidak terdapat kausa bertentangan (lihat perenggan 47).

[English summary

The defendant executed two charges under the National Land Code ('NLC') in the interest of the plaintiff to secure a facility given by the plaintiff to the defendant and Unis Far East Sdn Bhd. The amount owed under the charge was to be paid by the defendant upon a demand by the plaintiff. However, the borrower failed to repay the facility. The plaintiff demanded payment due under the charge. As the defendant had failed to revive the breach of the facility agreement, the plaintiff commenced the proceedings for an order for sale of the charged land. Among the objections put forward by the defendant was, inadmissibility of the loan statement of account which was against s 90A of the Evidence Act 1950 ('the Act'), non-compliance with O 83 r 3 of the Rules of the High Court 1980 ('RHC') and s 257(1)(c) of the NLC, non-service of the compulsory Form 16D notice and the mistake in the Form 16D and in the certificate of indebtedness.

Held, allowing the plaintiff's application with costs:

(1) Section 2 of the Act provides exception to proceeding which used affidavits tendered in the court (see para 12).

(2) The plaintiff could recover the actual amount due in the affidavit based on the details in O 83 of the RHC. The defendant did not raise the issue that the further affidavit under O 83 which was filed by the plaintiff for the purpose of following trial dated did not fulfill the details in O 83. Thus, it could not be said that the plaintiff had not prepared the accounts details as per O 83 and even if there were any omissions, this court has the power to exclude the past omissions as it had been revived (see para 23).

(3) The order for sale had stated the amount due according to requirement of s 257(1)(c) of the NLC and the order for sale was made after hearing the submissions of defendant in objection (see paras 24–25).

(4) The defendant's submission challenging the service on them could not be sustained as the service was valid. Therefore, the defendant's objection was not applicable (see para 31).

(5) The order for sale applied by the plaintiff was according to the provisions in the NLC. The plaintiff had produced the certificate of indebtedness and according to *Cempaka Finance Berhad v Ho Lai Ying* [2006] 2 MLJ 120, the learned judge held that the certificate of indebtedness was conclusive proof and the burden shifted to the defendant to rebut the wrong sum (see para 43).

(6) The defendant had not adduced any evidence, challenged the certificate of indebtedness nor rebutted the sum claimed and therefore the burden of proof had not been rebutted by the defendant. From the defendant's objections, it was clear that there was no cause to the contrary (see para 47).]

Nota-nota

Untuk kes-kes mengenai perintah jualan, lihat 8(2) *Mallal's Digest* (4th Ed, 2005 Reissue) perenggan 2255–2382.

Kes-kes yang dirujuk

Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi [2005] 3 MLJ 361, MT (dirujuk)

Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir [2006] 4 MLJ 451, MT (dirujuk)

Arab Malaysia Bank Bhd v Lian Yit Engineering Sdn Bhd [2000] 2 MLJ 51, MT (dirujuk)

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283; [1993] 1 CLJ 437, MT (dibeza)

Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd [2000] 2 MLJ 113, MT (dirujuk)

Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor [1995] 2 MLJ 537; [1995] LNS 33, MT (dirujuk)
Bank Utama (M) Bhd v Cascade Travel & Tours Sdn Bhd [2000] 4 MLJ 582, MT (dirujuk)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, MP (diikut)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, MR (dibeza)
Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608, MT (dirujuk)
Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829, MP (dirujuk)
Co-operative Central Bank v Meng Kuang Properties Bhd [1991] 2 MLJ 283, MT (dibeza)
Credit Corporation (M) Bhd v Lucky Height Development Sdn Bhd & Anor [1996] 4 MLJ 556, MT (dibeza)
Diamond Peak Sdn Bhd v United Merchant Finance Bhd [2003] 2 MLJ 346; [2003] 2 AMR 637, MR (dirujuk)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1, MR (dirujuk)
Hong Leong Finance Bhd v Travers Development Sdn Bhd [2001] 5 MLJ 268, MT (dirujuk)
Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd [1998] 2 MLJ 440; [1998] 2 CLJ 261, MR (dirujuk)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, MP (dirujuk)
Maimunah bt Megat Montak v Maybank Finance Bhd [1996] 2 MLJ 422; [1996] 2 AMR 2473, MA (dirujuk)
Malayan Banking Bhd v Fu Xing Aluminium dan Kaca Sdn Bhd [2007] 1 MLJ 233, MT (dirujuk)
Malayan Banking Bhd & Anor v PK Rajamani & Anor [1994] 1 MLJ 405; [1997] 3 CLJ Supp 353, MA (dirujuk)
Maybank Finance Bhd v Wong Gieng Suk & Anor [2002] MLJU 523; [2003] 1 CLJ 27, MT (dibeza)
Multi-Purpose Bank Bhd v Diamond Agreement Sdn Bhd [2000] 5 MLJ 576, MT (dirujuk)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, MP (dirujuk)
Muthukrishnan a/l Suppiah v Menteri Hal Ehwal Dalam Negeri & Anor [1994] MLJU 570; [1994] 3 AMR 2259, MT (dirujuk)
Nira Sdn Bhd v Malayan Banking Bhd [1990] 1 MLJ 110, MA (dirujuk)
Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67, MT (dirujuk)
Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd [1997] 5 MLJ 185, MT (dibeza)
Perwira Habib Bank Malaysia v Lum Choon Realty Sdn Bhd [2006] 5 MLJ 21; [2006] 6 AMR 105, MP (dirujuk)
PP v Ong Cheng Heong [1998] 6 MLJ 678, MT (dirujuk)

Public Bank Bhd v Lee Kin Mio & Anor [2006] 3 MLJ 47, MT (dirujuk)
Re Ong Thim Kuang; ex p Public Bank Bhd and other cases [2000] 5 MLJ 442, MT (dirujuk)
Riedel-De Haen Ag v Liew Keng Pang [1989] 2 MLJ 400, MT (dirujuk)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd [2004] 2 MLJ 31, MR (dibeza)
Southern Finance Bhd (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor [2006] 6 MLJ 673, MT (dirujuk)
Standard Chartered Bank Malaysia Bhd v Tunku Mudzaffar bin Tunku Mustapha [2005] 1 MLJ 604, MT (dibeza)
VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almerhum Sultan Idris [1933] MLJ 18, MR (dirujuk)

Undang-Undang yang dirujuk

Akta Keterangan 1950 ss 2, 90A
Akta Tafsiran 1948 dan 1967 s 12
Kaedah-Kaedah Mahkamah Tinggi 1980 A 10 k 1(1), A 83 k 3(3), (c), (6), (7)
Kanun Tanah Negara ss 256(3), 257(1)(c), 340, 431(1), (b), (c), Borang 16A, 16D

AS Lua (Soo Thien Ming & Nashrah) bagi pihak plaintif.
Prema Naidu (Rajan Navaratnam) bagi pihak defendan.

Azman Abdullah PK:

LATAR BELAKANG KES

[1] Pihak defendan telah melaksanakan dua cagaran di bawah Kanun Tanah Negara ('Kanun') atas kepentingan pihak plaintif ke atas tanah di bawah hakmilik PN 2236 Lot 101 Bandar Kuala Lumpur, seperti mana eksh CB1 (afidavit sokongan plaintif — lampiran 2 ('AS2') untuk cagaran pertama dan eksh CB2 ('ASP2') untuk cagaran kedua.

[2] Cagaran-cagaran tersebut adalah untuk jaminan bagi kemudahan yang diberikan oleh plaintif kepada defendan dan Unis Far East Sdn Bhd seperti berikut:

(a) pinjaman berjangka sebanyak RM3,600,000 kepada defendan; dan

(b) pinjaman berjangka sebanyak RM2,914,000 kepada Unis Far East Sdn Bhd.

[3] Surat tawaran kepada kedua-dua peminjam ke atas kemudahan seperti mana eksh CB6 (afidavit balasan plaintif-1-lampiran 6 ('ABP1') dan perjanjian kemudahan antara plaintif dan defendan eksh CB10 ('ABP1').

[4] Jumlah yang terhutang di bawah cagaran adalah perlu dibayar oleh defendan atas tuntutan oleh plaintif seperti mana di seksyen 3.01 cagaran-cagaran (covenant to pay) di ms 10 dan 39 (CB1 dan CB2).

[5] Pihak peminjam telah gagal untuk membayar ke atas kemudahan tersebut oleh plaintif melalui surat-surat bertarikh 30 Mei 2006 dan 15 Jun 2006 (seperti mana eksh BC3 ('ASP2')) telah menuntut bayaran yang tertangguh di bawah cagaran tersebut. Defendan telah gagal untuk memulihkan pemecahan perjanjian kemudahan di dalam Borang 16D. Pemecahan tersebut berterusan dan plaintif telah memulakan tindakan ini untuk arahan jualan tanah tercagar tersebut sebagai jaminan untuk bayaran balik ke atas kemudahan-kemudahan tersebut.

BANTAHAN-BANTAHAN DEFENDAN

[6] *Ketidakbolehterimaan penyata akaun pinjaman* (eksh CB5 dan CB5A) yang berlawanan dengan s 90A Akta Keterangan 1950 atas alasan keterangan cetakan melalui komputer perlu keterangan secara lisan perlu pada keterangan saksi memandangkan penyata akaun tersebut tidak bertandatangan. Defendan berlandaskan kes-kes berikut *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1, *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678, *Bank Utama (M) Bhd v Cascade Travel & Tours Sdn Bhd* [2000] 4 MLJ 582 dan *Hong Leong Finance Bhd v Travers Development Sdn Bhd* [2001] 5 MLJ 268.

[7] *Ketidakpatuhan* A 83 k 3(3), (6) dan (7) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), bahawa plaintif diwajibkan untuk memberi faedah atau jumlah tertunggak untuk pembayaran balik pada tarikh saman pemula difailkan. Defendan menegaskan tidak terdapat di dalam afidavit sokongan serta saman semula pernyataan berkenaan butir-butir ini. Begitu juga dengan peruntukan di bawah k 3(7) plaintif diwajibkan memberi butir-butir faedah sehari. Hujahan defendan adalah berlandaskan kes-kes berikut:

(a) *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, Mahkamah Persekutuan memutuskan seperti berikut:

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is *first* concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. *Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next* he is concerned with the very narrow question whether the material produced before him by the charger constitutes cause to the contrary. In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the

charger has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale.

(b) *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283; [1993] 1 CLJ 437 diputuskan:

> I am in full agreement with Mr Justice Razak's decision in *Malayan Banking Bhd lwn Dagang Bina Sdn Bhd* [1991] 3 CLJ 1739 where an order for sale in a foreclosure proceeding was not allowed due to the failure of the plaintiff bank in complying with O 83 r 3(3) of the Rules of the High Court, to disclose the amount of any interest or installment in arrears at the date of issue of their originating summons and at the date of their affidavit.

Dan beberapa kes lain lagi iaitu:

— *Perwira Habib Bank Malaysia v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21; [2006] 6 AMR 105;

— *Malayan Banking Bhd & Anor v PK Rajamani & Anor* [1994] 1 MLJ 405; [1997] 3 CLJ Supp 353 di ms 361 (CLJ); dan

— *Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor* [1995] 2 MLJ 537; [1995] LNS 33.

Ketidakpatuhan s 257(1)(c) Kanun Tanah Negara ('Kanun'), defendan berlandaskan kes *Diamond Peak Sdn Bhd v United Merchant Finance Bhd* [2003] 2 MLJ 346; [2003] 2 AMR 637 yang menyatakan:

> At the conclusion of the argument, we were unanimously of the opinion that the provisions of s 257(1)(a) to (d) were mandatory, and as the order for sale in the present case had suffered from defects herebefore mentioned, it was thereby invalidated.

Ketidakserahan notis wajib iaitu Borang 16D, mengikut hujahan defendan melalui eksh CB4 adalah jelas notis tersebut dihantar kepada satu syarikat bernama Escorial Corporation Sdn Bhd bukannya Titik Juta Sdn Bhd. No syarikat adalah juga berbeza dan plaintif gagal membuktikan notis ini diserah kepada defendan. plaintif hanya menyerahkan kepada setiausaha syarikat defendan yang mempunyai alamat perniagaan yang sama. Pihak defendan berlandaskan kes *Standard Chartered Bank Malaysia Bhd v Tunku Mudzaffar bin Tunku Mustapha* [2005] 1 MLJ 604 dinyatakan oleh hakim berkenaan:

> In my judgment, to repeat what has been stated earlier, service of the Form 16D notice on the defendant is mandatory for the purpose of s 256 of the NLC. The burden of proof as to sevice of that notice is on the plaintiff, and the plaintiff has to prove service of the same on a balance of probabilities.

Defendan menghujahkan mereka tidak dapat mengetahui berapakah jumlah yang tertunggak sekiranya Borang 16D tersebut tidak diserahkan kepada defendan sendiri.

Kesilapan yang wujud di dalam Borang 16D; notis 16D tidak sah dan batal memandangkan berikut:

(a) kadar faedah 3.5% tidak pernah defendan akui. Surat tawaran (CB-B) faedah dinyatakan hanya 2.25% sahaja. Plaintif telah kenakan 2.5% dan tambahan 1% penalti berkuatkuasa dari tarikh matang bukan dari tarikh 1 Julai 2006 sepertimana tuntutan plaintif dan tidak mematuhi perjanjian;

(b) tuntutan plaintif sebanyak RM3,013,540.71 setakat 30 Jun 2006 atas kemudahan kepada defendan dan jumlah di eksh CB5A setakat tarikh yang sama adalah RM3,014,223.06. Perbezaaan jumlah tersebut tidak dijelaskan oleh pihak plaintif; dan

(c) tuntutan plaintif sebanyak RM2,984,039.05 setakat 30 Jun 2006 kemudahan kepada Unis Far East tanpa disokong oleh penyata bulanan. Notis tersebut sebenarnya diberikan kepada syarikat Escorial Corporation Sdn Bhd pada 6 Julai 2007 iaitu tiga hari sebelum tarikh 30 Jun 2006.

[8] Kesilapan-kesilapan dalam sijil keberhutangan (eksh CB9) iaitu:

(a) tidak dinyatakan faedah dan kadar faedah yang dikenakan;

(b) jumlah tertunggak yang salah di perenggan (1) RM3,013,540.71 setakat 30 Jun 2006, tetapi eksh CB-5A menyatakan jumlah RM3,014,223.06 (hujahan sama di para 5b di atas). Berlandaskan kes *Malayan Banking Bhd v Fu Xing Aluminium dan Kaca Sdn Bhd* [2007] 1 MLJ 233 iaitu:

> There were merits in the defendant's objection as regards amount stated in the notice of demand. *Since the figure of RM3,862,530.05 was questioned and remained ambiguous, the filing of the ten affidavits computing the amount due and owing at those dates were of no significance*. The plaintiff failed to state the correct amount outstanding and the interest charged under the said charge.

(c) Sijil tersebut tidak merujuk kepada sebarang nombor akaun kedua-dua kemudahan. Oleh itu bagaimana untuk penentuannya. Kes Mahkamah Rayuan adalah dirujuk iaitu; *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd* [2004] 2 MLJ 31:

> A guarantor is not bound by a certificate issued under a conclusive evidence clause if he was able to show that there is a manifest error on the face of the certificate. *In the instant case, it was clear from the*

evidence that the certificate of indebtedness contained numerous errors. It could not therefore be conclusive proof of the debts against the appellants. It was therefore invalid, null and void and could not be binding upon the appellants as guarantors.

JAWAPAN KEPADA BANTAHAN-BANTAHAN DEFENDAN DI ATAS

Isu pertama: *Ketidakbolehterimaan penyata akaun pinjaman (eksh CB5 dan CB5A) yang berlawanan dengan s 90A Akta Keterangan 1950 ('Akta')*

[9] Penyata akaun kemudahan yang diberikan kepada peminjam dikatakan berlawanan dengan s 90A Akta, pihak defendan telah merujuk kepada empat kes, dua kes jenayah dan dua kes sivil. Walau bagaimanapun s 2 Akta telah memperuntukkan kecualian kepada kes-kes di mahkamah yang menggunakan afidavit. Seksyen tersebut adalah seperti berikut:

Seksyen 2 Takat (extent)

Akta ini hendaklah dipakai bagi segala prosiding kehakiman di dalam atau di hadapan mana-mana mahkamah, tetapi tidak dipakai bagi afidavit yang diserahkan kepada mana-mana mahkamah atau pegawai dan juga tidak dipakai bagi prosiding di hadapan seseorang penimbangtara; (terjemahan di bawah ini).

Section 2 This act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

[10] Kes-kes di bawah ini telah memutuskan isu yang sama bahawa Akta tidak terpakai di dalam prosiding yang menggunakan afidavit.

(i) *Muthukrishnan a/l Suppiah v Menteri Hal Ehwal Dalam Negeri & Anor* [1994] MLJU 570; [1994] 3 AMR 2259;

(ii) *Re Ong Thim Kuang; ex p Public Bank Bhd and other cases* [2000] 5 MLJ 442;

(iii) *Southern Finance Bhd (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor* [2006] 6 MLJ 673; dan

(iv) *Riedel-De Haen Ag v Liew Keng Pang* [1989] 2 MLJ 400.

Isu Kedua: *Ketidakpatuhan A 83 k 3(3), (6) dan (7) KMT 1980:*

[11] Di dalam kes *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, yang dirujuk defendan perlu dilihat lebih mendalam lagi keputusan kes tersebut di mana diputuskan 'kausa bertentangan' dalam s 256(3) Kanun itu boleh didirikan cuma di dalam tiga kategori kes-kes; (i) di mana seseorang penggadai berjaya membawa kesnya ke dalam mana-mana kekecualian

kepada doktrin ketidakbolehsangkalan dalam s 340 Kanun itu; (ii) di mana seorang penggadai boleh menunjukkan bahawa pemegang gadaian telah gagal memenuhi syarat-syarat terdahulu untuk membuat permohonan untuk satu perintah jualan; dan (iii) di mana seorang penggadai boleh menunjukkan bahawa pemberian satu perintah jualan adalah bertentangan dengan sesuatu peraturan undang-undang atau ekuiti. Jika tiada kuasa bertentangan boleh ditunjukkan, mahkamah terpaksa membuat satu perintah jualan. Gopal Sri Ram HMR memutuskan:

> In our judgment, 'cause to the contrary' within s 256(3) may be established only in three categories of cases.
>
> First, it may be taken as settled that a charger who is able to bring his case within any of the exceptions to indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary.
>
> In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss (2) and (4) (b) above will be held to have established cause to the contrary under s 256(3). The decision of Smith J in *Subchent Kaur v Chai Sau Kian* [1958] MLJ 32, of the former Federal Court in *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189, of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.
>
> Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.
>
> Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v Letchumanan Chettiar* [1993] MLJ 269 at p 298 where he said:
>
> > I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has

> been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'show cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

[12] Begitu juga di dalam kes *Perwira Habib Bank Malaysia v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21 (MP), Abdul Hamid Mohamad HMP (Mahkamah Persekutuan) merujuk kepada kes *Low Lee Lian v Ban Hin Lee Bank Bhd*, di ms 47 menyatakan seperti berikut:

> For clarity, I would paraphrase the third question this way. First, whether the decision of the Court of Appeal in holding that the non-compliance with the provisions of O 83 r 3 by including the sum claimed as due in the order for sale is in conflict with the decision of this court in *Low Lee Lian*. Secondly, whether in holding that the fact that the notice of variation of the interest rate had not been given renders the order for sale defective conflicts with *Low Lee Lian*.
>
> First, let us look at *Low Lee Lian*. In *Low Lee Lian*, the chargee applied for an order for sale which was resisted by the chargor. However, after a hearing, the order for sale was made. The chargor appealed. In the court of appeal, there were three issues but only one is presently relevant ie, the effect of the chargee varying the rate of interest without giving notice to the chargor. From my reading of the judgment, the court did not specifically address the issue. Instead, it focused on a larger issue of 'cause to the contrary'. The court held that as no 'cause to the contrary' could be shown, the order for sale was rightly made. The court also held that it was not sufficient to allege mere breaches by the chargee of the loan agreement or even the terms of the annexure to the charge in order to resist an application under s 256(3) of the NLC. In other words, by alleging that the chargee had varied the interest rate without giving notice, which, if true, is merely a breach of the loan agreement and/or the annexure to the charge, is not sufficient to show 'cause to the contrary'.
>
> Coming back to the instant appeal. The issue in the second limb as paraphrased by me ie, varying the rate of interest without giving notice, was not discussed by the learned High Court judge. It could be that it was not argued as a separate point. However, in the Court of Appeal, this argument was raised, as can be seen from the judgment. In the judgment, the learned judge of the Court of Appeal said:
>
> > We agreed with the learned counsel for the appellant that when the second offer was made and accepted it was stated clearly that offer would extinguish the first offer upon which the first charge was based and the first offer was of no consequence anymore. The second charge made it very clear that the rate of interest is 2% above BLR. As I had stated earlier, the rate of the BLR is not stated anywhere in the charge. As such, the appellant was left in the dark as to the actual rate of interest applicable. This was further confounded by the fact that in the amount claimed also included interest rate which had been varied. Secondly, the learned counsel for the appellant also contended that the

respondent arbitrarily varied the interest rate from 15.5%pa to 16.5%pa when the respondent made the application for the order for sale. Nowhere in the affidavits of the respondent that the respondent had given notice in writing of the variation as required by the charge instrument. As such it is clear to us that the respondent had not complied with O 83 r 3 of the RHC.

[13] Jika diteliti pihak plaintif telah memfailkan afidavit A 83 sebelum tarikh perbicaraan yang mengandungi butir-butir yang diperlukan di dalam A 83 k 3(3), (6) dan (7) KMT.

[14] Berlandaskan kes *Arab Malaysia Bank Bhd v Lian Yit Engineering Sdn Bhd* [2000] 2 MLJ 51, hakim tersebut menolak bantahan defendan atas isu yang sama dan memutuskan bahawa kegagalan semata-mata untuk memberikan butiran-butiran tidak membangkitkan 'sebab-sebab di sebaliknya' (a cause to the contrary) menurut s 256(3) Kanun. Izinkan saya memetik penghakiman tentang isu ini:

The defendants relied heavily upon the decision of *Mahadev Shankar* J (as he then was) in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 where he held that the objective of O 83 r 3 of the RHC is to enable the defendant to know at least by the date of the filing of the originating summons, what is the exact sum he is legally liable to pay so that he can make up his mind to contest of pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the chargee at the date on which the order is made'. Since these words are from s 257(1)(c) of the NLC and thus mandatory, the defendants argued that the learned judge had therefore interpreted O 83 r 3 of the RHC in the spirit and intent of the legislation as contained in s 257 of the NLC. The defendants further argued that despite the fact that s 257 does not provide for specific provisions requiring particularisation of accounts as compared with O 83 r 3 of the RHC, the mandatory requirements of particularisation as provided for under O 83 r 3 of the RHC in respect of an order for delivery of vacant possession of the property should be equally applicable in respect of an applicable in respect of an application for an order for sale under s 257 of the NLC.

I do not accept this argument. The Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 has restricted the interpretation of 'cause to the contrary' by setting out three categories of cases, namely:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

Under this first issue raised, the defendant merely attempts to show that the plaintiff chargee had failed to give details and particulars. Holding that such an attempt by the chargor to resist an application for an order for sale was an act challenging the indefeasibility of the chargee's right to the land, that is, a right in rem, the Federal Court in *Low Lee Lian* went on to hold that an allegation that the chargee acted in breach of contract, whilst giving rise to an independent action in personam is insufficient per set to defeat the ad rem rights of a chargee under his registered charge, to an order for sale. Gopal Sri Ram JCA in delivering the judgment of the Federal Court said at p 88:

> On no account should he (the judge) express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.

He added at p 89 as follows:

> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the chargor's action.

In the circumstances, based on the decision of the Federal Court which binds me, I reject the first issue raised by the defence, and hold that a mere failure to give details and particulars does not raise a 'cause to the contrary' pursuant to s 256(3) of the NLC.

[15] Di dalam kes lain, iaitu kes *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608, mahkamah memutuskan:

> Objektif A 83 k 3 adalah untuk membolehkan defendan mengetahui sekurang-kurangnya pada tarikh saman permulaan difailkan, apakah jumlah sebenar yang beliau mempunyai liabiliti di sisi undang-undang untuk membayar, supaya beliau boleh membuat keputusan untuk mempertikai atau membayarnya. Jika terdapat suatu pertikaian mengenai jumlah yang perlu dibayar, mahkamah mesti dapat berkata dengan tepat apabila membuat perintahnya 'jumlah penuh yang terhutang kepada pemegang cagaran pada tarikh bila mana perintah itu dibuat' (the total amount due to the chargee at the date on which the order is made'). Perkataan-perkataan ini diambil dari s 257(1)(c) Kanun Tanah Negara 1965 dan adalah mandatori.

[16] Di dalam penghakimannya Mahadev Shankar H menyatakan:

> Defence counsel submitted on the authority of *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* at p 359, that if all the required statutory particulars are not contained in the very first affidavit filed in support of the originating summons, there is a 'fundamental breach' which is incurable and the entire proceedings are thereby rendered nugatory.
>
> The concept of 'fundamental breach' is one peculiar to non-performance of obligations which go to the root of a contract, and I am not sure how appropriate it is in the present context. With respect to defence counsel, I do not think that this case supports the proposition he advanced.
>
> The real basis of that decision was that there was a total failure to serve the defendant with notice of appointment for the adjourned hearing. There was thus a deprivation of the right of being heard. The proceedings were therefore a nullity (see passages at p 363). In this respect, the law appears to give the defendant a second chance to put in an appearance.
>
> As much as the verb 'must' appears in O 83 r (3) (a), so does the verb 'shall' appear in O 2 r 1 whereby the failure to comply with any of the RHC shall not nullify the proceedings. So one must ask oneself what the objective of O 83 r (3) was. It is to tell the defendant how much precisely is being claimed so that he can make up his mind to contest or pay up.

[17] Kes-kes lain seterusnya telah menerima pakai kes di atas seperti di dalam kes Mahkamah Agung, *Maimunah bt Megat Montak v Maybank Finance Bhd* [1996] 2 MLJ 422; [1996] 2 AMR 2473, dan kes-kes berikut iaitu *Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd* [2000] 2 MLJ 113, *Multi-Purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576.

[18] Kes *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283; [1993] 1 CLJ 437, yang dirujuk oleh pihak defendan di atas boleh dibezakan, di mana plaintif di dalam afidavit menyatakan jumlah tertunggak setakat 25 April 1986 manakala afidavit diikrarkan pada 30 Jun 1986, afidavit berikutnya difailkan sebelum perbicaraan akhir juga tidak cuba memulihkan kecacatan jumlah tertunggak dan tidak menunjukkan kadar faedah yang dikira. Mahkamah telah menolak hujahan sama oleh defendan atas alasan tidak mematuhi A 83 k 3(3)(c).

[19] Manakala kes kedua yang dirujuk oleh defendan iaitu *Kimden Housing Development Sdn Bhd*, telah diputuskan oleh kes terkini di dalam kes *Public Bank Bhd v Lee Kin Mio & Anor* [2006] 3 MLJ 47, telah diputuskan oleh Low Hop Bing H yang menjelaskan lagi isu ini iaitu:

> The judgment in *Kimden Housing Development Sdn Bhd*, must be read in juxtaposition with that in *Citibank NA v Ibrahim bin Othman*, where the defendant claimed that the plaintiff had failed to provide the statutory particulars

in the first affidavit in support of its application, viz, the amount of the advance and the rate at which interest had been calculated. Mahadev Shankar J (later JCA) held, inter alia, that the plaintiff had applied for an order for sale in order to effect repayment of moneys secured by a charge and, on a reading of O 83 r 1(1)(a), (b), (c), 3(3) and 3(6) together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated. Hence, the plaintiff's application was dismissed. The learned judge however added p 615A–C as follows:

> … it is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O 83 r 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg, for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

The learned judge also rejected the contention that if all the statutory particulars are not contained in the very first affidavit filed in support of the originating summons, there is a 'fudamental breach' as the concept of 'fundamental breach' is one peculiar to non-performance of obligations which go to the root of a contract. The learned judge was not sure how appropriate it was in that context and did not think that *Kimden Housing Development Sdn Bhd* supported the proposition advanced for the defendant before His Lordship.

[20] Pihak plaintif boleh memulihkan jumlah tertunggak yang sebenar di dalam afidavit berikutnya menunjukkan butiran-butiran di bawah A 83. Pihak defendan tidak pun membangkitkan isu bahawa afidavit selanjutnya di bawah A 83 yang difailkan oleh plaintif untuk tujuan tarikh-tarikh perbicaraan berikutnya tidak menepati butiran-butiran di dalam A 83. Oleh itu tidaklah boleh dikatakan pihak plaintif tidak menyediakan butiran akaun mengikut keperluan A 83 dan jika pun terdapat apa-apa peninggalan dan oleh kerana telah dipulihkan mahkamah ini mempunyai kuasa untuk mengecualikan peninggalan yang lepas itu jika berlandaskan kes-kes di atas tadi.

Isu Ketiga: *Ketidakpatuhan s 257(1)(c) Kanun*

[21] Mahkamah semasa membenarkan perintah jualan pada 9 Mei 2008 telah menyatakan jumlah tertunggak yang diperlukan oleh s 257(1)(c) ini sebanyak RM6,984,040.92. Peruntukan tersebut adalah seperti berikut;

A Section 257(1)(c)

(1) Every order for sale made by the court under section 256 shall be in Form 16H and shall:

B (c) specify the total amount due to the charge at the date on which the date on which the date on which the order is made;

[22] Pihak defendan menghujahkan agak awal memandangkan perintah jualan dibuat setelah mendengar hujahan bantahan defendan ini barulah C jumlah tertunggak dinyatakan semasa membuat perintah jualan.

[23] Keadaan ini dijelaskan oleh Mahkamah Agung di dalam kes *Nira Sdn Bhd v Malayan Banking Bhd* [1990] 1 MLJ 110:

D In conclusion, we were of the view that although s 257(1)(c) … provides that every order for sale under s 256 shall 'specify the total amount due' and therefore requires a chargee to show the court the total amount due to it at the date on which the court makes the order, yet we considered that for the purpose of enabling any chargee to obtain the sale of a land or lease to which his charge relates in the event E of a breach by the chargor of any of the agreements on his part expressed or implied therein, the essential requirements of the law are that there be compliance with the provision of s 254 or s 255 …

On the evidence adduced, the respondent had on its application satisfied the court that the prior requirements of the law for an order for sale by the court have been F complied with, and that default has been made by the appellant. The learned judge was therefore correct in making the said order. (Gunn Chit Tuan SCJ (delivering the judgment of the court) at pp 111–112).

Isu Keempat: *Ketidakserahan notis wajib iaitu Borang 16D oleh plaintif ke atas* G *defendan*

[24] Pihak plaintif telah memenuhi syarat di seksyen 9.02 cagaran pertama di eksh CB1 dan seksyen 10.1 cagaran kedua eksh CB2 iaitu mensyarat penyerahan notis tuntutan seperti berikut:

H Seksyen 9.02 (cagaran pertama CB1)

(2) … Any notice, demand … required to be given to the chargor by the chargee hereunder may be given by any letter, facsimile transmission or telex … and if given by … letter be addressed to the chargor at the I address stated in Item 1 of the Schedule hereto of … at such other address last known to the chargee.

(3) Any notice, demand … delivered personally shall be delivered to or left at the address specified above and shall be deemed to be given at the time of such delivery or when left at such address.

Seksyen 10.1 (cagaran kedua CB2)

(2) … every notice, demand … under this Charge shall be in writing and:

(ii) any … notice, demand … required to be given by the chargee to the chargor hereunder may be given by the chargee... and shall be deemed duly given:

(aa) if addressed to the chargor at and left at … at the address stated in Item 1 of the schedule hereto… or at the chargor's last known place of... business or, as the case may be, the chargor's registered office…

[25] Begitulah juga dengan peruntukan di bawah s 431(1)(b) dan (c) Kanun iaitu seperti berikut:

Seksyen 432(1) — Cara-cara penyampaian:

Tanpa menyentuh mana-mana cara penyampaian, suatu notis boleh disampaikan kepada mana-mana orang atau perbadanan untuk tujuan-tujuan Akta ini —

(a) ...

(b) dengan menyampaikan notis itu —

(i) di tempat biasa atau tempat tinggal akhir orang itu yang diketahui atau perniagaan, kepada kakitangan atau kepada ahli keluarganya yang dewasa; atau

(ii) di pejabat berdaftar perbadanan atau tempat perniagaan biasa atau yang akhir diketahui kepada kakitangannya atau ejennya; atau

(c) dengan memasukkan notis itu dalam sampul beralamat kepada orang atau perbadanan itu —

(i) di tempat tinggal atau perniagaan orang itu yang biasa atau akhir diketahui; atau

(ii) di pejabat berdaftar perbadanan atau tempat perniagaan biasa atau akhir diketahui; atau

(d) dengan menghantarkan notis melalui pos berdaftar bayar dahulu kepada orang atau perbadanan tersebut di alamat untuk penyampaian

yang diberikan menurut mana-mana peruntukan Akta ini, atau jika tiada alamat sedemikian diberi —

(i) di tempat biasa atau tempat tinggal atau perniagaan yang akhir diketahui; atau

(ii) di tempat pejabat berdaftar perbadanan atau tempat perniagaan biasa atau akhir diketahui; atau

(e) dengan menggantikan penyampaian menurut seksyen 432.

[26] Alamat defendan di dalam Borang 16A gadaian bertarikh 20 Jun 2000 dan perjanjian gadaian adalah No 225, Jalan Burung Garuda, Taman Bukit Maluri, 52100 Kuala Lumpur (CB1). Manakala untuk jaminan gadaian kepada pinjaman oleh Unis Far East Sdn Bhd di borang gadaian 16A bertarikh 23 November 2005, defendan menggunakan alamat di Suite 10.2, Tingkat 10, Menara CSM, Jalan Semangat, Petaling Jaya (eksh CB2). Nombor syarikat defendan di CB1 dan CB2 adalah sama iaitu 369603-P.

[27] Akuan serahan yang diikrarkan melalui surat akuan ('CB4') oleh penyerah saman plaintif, Hamzah Mokhtar menyatakan alamat yang dibuat serahan adalah seperti di atas begitu juga dengan surat iringan penyerahan 'Form 16D' plaintif kepada defendan bertarikh 4 Julai 2006 juga di kedua-dua alamat iaitu di suite 10.2 Level 10 dan Suite 8.02, Level 8.

[28] Syarikat Escorial Corporation Sdn Bhd di dalam AR kad sebagai penerima surat tersebut, syarikat ini adalah setiausaha syarikat kepada defendan, (eksh CB8). Oleh itu apa pun hujahan defendan mencabar kesahan serahan ke atas mereka tidak boleh diterima oleh kerana alamat defendan terakhir digunakan, diposkan secara AR berdaftar. Setiausaha syarikat yang akui terima surat tersebut adalah bukannya isu, defendan boleh arahkan setiausaha syarikatnya yang menerima apa-apa surat rasmi seperti ini.

[29] Kes *Standard Chartered Bank Malaysia Bhd* yang dirujuk oleh peguam defendan adalah perlu dibezakan. Di dalam fakta kes tersebut afidavit penyerah saman hanya menyatakan beliau hanya:

dengan meninggalkan surat dan Borang 16D tersebut di alamat di atas …

[30] Namun begitu Hishamudin H di dalam kes tersebut menjelaskan lagi dengan kenyataan berikut:

It is the duty of this court to ensure that service was done properly and fairly. But how is the court to judge that there has been a proper and fair service if the affidavit of service does not contain a fair amount of information as to how the service was actually done by proses server?

[31] Defendan juga mengemukakan dua kes lain iaitu kes *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440; [1998] 2 CLJ 261, dan *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374.

[32] Hujahan defendan ini dapat dipatahkan dengan beberapa kes berikut antaranya ialah di dalam kes *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67, Suriyadi H, memutuskan walaupun penerima bernama 'Yanti' bukan merupakan nama defendan, ianya tidak menjejaskan penyerahannya dan dianggap diserah. Selain dari A 10 k 1(1) KMT, hakim tersebut telah juga merujuk kepada s 12 Akta Tafsiran 1948 dan 1967, di mana satu undang-undang bertulis memberi kuasa untuk penyampaian hendaklah dianggap telah disempurnakan pada masa bila surat tersebut telah dihantar, melalui proses pos melainkan dapat disangkal oleh defendan;

To conjure or add something out of that brief 'second portion', which had not been provided for, would tantamount to importing certain ingredients that were not envisaged by Parliament. In fact under sub–r 1(1) of O 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it, ie if it was sent by prepaid AR registered post. It therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being 'Yanti' did not vitiate that service. In fact, whether that writ had physically arrived, or had been received at the last known address, normally confirmed by direct evidence, is not even legislated into that impugned provision. On that score, if the plaintiff had direct and cogent the former, otherwise s 12 of the Interpretation Acts 1948 and 1967 would immediately come into play when invoked. Under the latter section, where a written law authorises postal service, then until the contrary is proved, service shall be presumed to have been effected at the time when the letter would have been delivered, in the ordinary course of the post. Therefore, unless rebutted by the defendants, service thus must be deemed to have taken place. As it were, I found no rebuttal evidence before me.

[33] Manakala Ramly Ali H di dalam kes *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir* [2006] 4 MLJ 451 memutuskan seperti berikut berkenaan isu serahan notis tuntutan melalui pos:

What the plaintiff has to do was clearly defined in the guarantee. In this case, cl 16, ie to send the notice of demand by prepaid post to the address last known to the plaintiff or as stated in the guarantee itself. This has been done twice. Therefore, the presumption is that the said notice of demand reached the first defendant in the course of post. It was not the plaintiff's duty to ensure that the said notice after being posted was actually received by the first defendant. The guarantee did not stipulate that obligation on the part of the plaintiff. Mere denial by the first defendant to the effect that he did not receive the notice was insufficient to rebut the said presumption, particularly in the present case, where the first defendant did not at any time dispute the correctness of the address in the notice of demand as well as on the envelope, the court was satisfied that this issue raised by the first defendant was not a triable issue (see para 39).

[34] Dengan ini saya putuskan serahan adalah sah dan bantahan defendan tidak boleh diterima pakai.

Isu kelima: *Adakah Notis 16D terbatal dan tidak sah*

[35] Pihak plaintif menyatakan yang kadar faedah di dalam Borang 16D iaitu 3.25% untuk akaun defendan dan 2.5% di atas kadar pinjaman asas ('BLR') untuk akaun Unis Far East Sdn Bhd adalah hak plaintif untuk mengenakan kadar faedah penalti di atas kegagalan bayaran sebanyak 1% setahun selain dari 2.25% di atas BLR setahun. Ini boleh dilihat pada surat tawaran kepada defendan bertarikh 8 Januari 2003 eksh CB6 di bawah kadar faedah dan faedah termungkir. Untuk Unis Far East Sdn Bhd pula surat tawaran bertarikh 6 September 2005 di bawah 'default interest rate' di dalam 'general terms and conditions'. Surat tuntutan ('CB3') dan surat tawaran ('CB6') adalah kadar faedah yang sama.

[36] Perbezaan antara jumlah tertunggak setakat 30 Jun 2006 sebanyak RM3,013,540.71 di dalam Borang 16D (eksh CB4) dan di dalam kenyataan akaun sebanyak RM3,014,223.06 (eksh CB5A). Yang menjadikan dua jumlah yang berbeza adalah satu angka adalah tanpa faedah harian dan satu lagi dengan faedah harian. Ini telah diterangkan oleh plaintif di dalam perenggan 6 afidavit balasan plaintif kedua. Plaintif melalui eksh CB5, menunjukkan keberhutangan penyata akaun syarikat Unis Far East Sdn Bhd setakat 30 Jun 2006. Adalah tidak benar bahawa plaintif tidak menunjukkannya.

[37] Di dalam kes *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 di ms 841 diputuskan oleh Mahkamah Persekutuan seperti berikut:

As to the ground (b), which alleged that the chargee had charged penalty interest, the record of appeal provided showed that Mr Selvathesan a/l Jagasothy, the appointee of the chargee under reg 9(1)(b) of the Essential (Protection of Depositors) Regulations 1986, had gone on affidavit to deny this allegation, but even if the allegation were true, this would not amount to 'cause to the contrary' within the meaning of s 256(3) of the Code (see *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77).

As to ground (c), which questions the validity of the restoration of the memorials relating to the charges concerned both on the issue documents of title and the relevant registers document of title, this submission is devoid of all substance. In allowing the appeal, this court had set aside the judgment of the High Court — this is to say, the whole of that judgment including the order directing cancellation of the memorials aforesaid. The parties were thus restored to the status quo ante, and there was thus clear authorisation for the memorials concerned to be restored.

A final point is worth making. The High Court at Seremban will, without further ado — and in accordance with our directions appearing in the penultimate para of our judgment in *Feyen* (at p 330) — make the orders referred to therein. It goes without saying that the orders for sale of the charged lands to be made by the High Court shall provide for the sale to be by public auction, require the sale to be held on a date specified therein and specify the total amounts due to the chargee under the charges as at the date on which the orders for sale are made, in accordance with s 257(1)(a), (b) and (c) of the Code respectively.

It follows, therefore, that the sole question for decision before the High Court will be total amounts due to the chargee under the charges as at the date on which the orders for sale are made and upon this question, the chargor Feyen shall have the opportunity of being heard.

In the result, for the reasons hereinbefore stated, we unanimously hold that this application is misconceived and must be, and is, dismissed with costs.

[38] Kedua-dua kes yang dihujahkan oleh defendan iaitu:

(i) *Co-operative Central Bank v Meng Kuang Properties Bhd* [1991] 2 MLJ 283; dan

(ii) *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd* [1997] 5 MLJ 185.

[39] Adalah kes berbeza oleh kerana di dalam kes hari ini kadar faedah telah dipersetujui oleh defendan melalui eksh CB3 dan CB6 tadi.

[40] Namun begitu perintah jualan yang dipohon oleh plaintif adalah mengikut peruntukan di dalam Kanun. Plaintif melalui CB9 telah kemukakan sijil keberhutangan. Mengikut kes Mahkamah Persekutuan di dalam kes *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, putuskan bahawa sijil ini adalah bukti yang

konklusif dan beban berpindah kepada defendan menyangkal jumlah adalah salah.

Isu keenam: *Adakah benar terdapat kekhilafan di dalam sijil keberhutangan CB9*

[41] Adalah tidak benar kekhilafan di eksh CB9, ini adalah kerana eksh CB5 menunjukkan angka tanpa faedah harian dan CB5A adalah angka dengan faedah harian. Kebanyakan kes-kes yang dirujuk oleh defendan untuk mencabar eksh CB9 adalah dapat dibezakan oleh peguam defendan.

[42] Antara kes-kes yang defendan rujuk dan dibezakan dengan hari ini adalah berikut:

(i) *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363, (MR), diputuskan defendan boleh kemukakan keterangan untuk menunjukkan kesilapan yang ketara pada permukaan sijil keberhutangan itu; tetapi dalam kes hari ini tidak ada keterangan yang dibawa oleh defendan untuk mencabar sijil keberhutangan CB9.

(ii) *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 2 MLJ 685, (MP), diputuskan di dalam kes ini sijil keberhutangan beroperasi di medan undang-undang 'adjectival'. Ia memberi alasan kepada plaintif daripada keperluan yang selanjutnya untuk mengemukakan bukti keberhutangan. Sijil sebegini mengalihkan beban bukti kepada defendan untuk menyangkal bukti amaun yang dituntut:

> The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

Di dalam kes hari ini defendan tidak kemukakan apa-apa keterangan untuk menyangkal jumlah yang dituntut oleh itu beban bukti gagal disangkal oleh defendan.

(iii) *Maybank Finance Bhd v Wong Gieng Suk & Anor* [2002] MLJU 523; [2003] 1 CLJ 27, (MT), di dalam kes ini diputuskan sijil keberhutangan tidak konklusif sebab tanpa nama plaintif dan defendan;

(iv) *Credit Corporation (M) Bhd v Lucky Height Development Sdn Bhd & Anor* [1996] 4 MLJ 556, (MT) diputuskan perubahan pada kadar faedah yang berkenaan tanpa notis perubahan itu dihantar adalah tidak sah kerana kadar faedah yang baru hanya perlu dibayar dan berkuatkuasa mulai daripada tarikh yang dinyatakan di dalam notis

itu. Oleh itu telah diakui oleh peguam plaintif bahawa tiada notis dihantar, ini bermakna bahawa terdapat tuntutan untuk pembayaran yang salah pada kadar faedah 12.5% padahal ianya sepatutnya 10.5%; tetapi di dalam kes hari ini tidak terdapat tuntutan yang tidak sah di sisi undang-undang.

(v) *Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi* [2005] 3 MLJ 361, (MT) defendan mencabar sijil keberhutangan tersebut dan plaintif bertanggungjawab untuk membuktikan kepada mahkamah ini setakat mana sebenarnya liabiliti defendan khususnya berkaitan permohonan wang yang diperolehi daripada jualan jaminan yang dicagarkan itu; di dalam kes hari ini tidak ada keterangan yang plaintif gagal untuk mengabaikan kiraan mana-mana bayaran.

(vi) *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd* [2004] 2 MLJ 31, (MR) diputuskan penjamin tidak diikat oleh perakuan yang dikeluarkan di bawah klausa keterangan muktamad jika beliau dapat menunjukkan bahawa terdapat kesilapan yang serius pada muka perakuan itu. Di dalam kes ini surat tuntutan dikeluarkan setelah sekian lama writ difailkan; di dalam kes hari ini tidak terdapat kesilapan tersebut pada sijil keberhutangan.

RUMUSAN

[43] Sebagai rumusan, saya merujuk kepada kes dari Mahkamah Persekutuan iaitu *Nira Sdn Bhd* yang telah dirujuk di atas, yang telah merujuk kepada satu kes lama, iaitu kes *VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almerhum Sultan Idris* [1933] MLJ 18 yang mana penerima cagaran menggunakan haknya untuk mendapatkan balik pinjaman yang diberikan yang dengan jelas tidak dibayar oleh peminjam, Thorne Ag CJ menjelaskan seperti berikut:

> By s 149 of the Land Code, it is provided that, after establishing the default on the part of the chargor in accordance with the provisions of the earlier sections of the Code, it shall be lawful for the chargee by summons to call the proprietor of the charged land to show cause why the land should not be sold by public auction under the direction of the court.
>
> It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that a default had been made by the chargor, and calling upon the charger by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.

A **[44]** Dengan pandangan dan pendapat mahkamah terhadap bantahan-bantahan defendan adalah jelas bahawa tidak terdapat kausa bertentangan ('cause to the contrary') di dalam s 256(3) KTN dan suratcara adalah teratur dengan ini mahkamah membenarkan permohonan saman pemula plaintif di lampiran 1 dengan kos.

B

Permohonan dibenarkan dengan kos.

Reported by Mashrifah Ravindren

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